

# A Juristic Critique on the Recent Amending Acts in Code of Civil Procedure, 1908 in Pakistan with Special Focus on the Khyber Pakhtunkhwa Civil Procedure (Amendment) Act, 2020 (Act No XLIX of 2020)

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## Abstract

*This paper critically analyzes the recent amendments to the Code of Civil Procedure, 1908, with a particular focus on the Khyber Pakhtunkhwa Civil Procedure (Amendment) Act, 2020 (Act No. XLIX Of 2020). It meticulously scrutinizes legislative changes, exposing inherent inconsistencies and anomalies that pose significant challenges for judicial interpretation. Emphasizing two pivotal issues—Section 6's introduction of pecuniary jurisdiction in filing civil suits and Section 96's redefinition of the appellate forum—the study navigates through potential conflicts, especially with Section 9 of the West Pakistan Civil Courts Ordinance, 1962. It raises concerns about the terminology used in Section 96 and its impact on the jurisdiction of District Courts and High Courts. The paper concludes by advocating for strategic measures, proposing either the withdrawal of the Act to alleviate confusion or the development of authoritative jurisprudence to systematically address the identified inconsistencies and anomalies within the legal framework.*

**Key Words:** Code of Civil Procedure Amendments, Pecuniary Jurisdiction, Judicial Interpretation, Legislative Inconsistencies, Appellate Forum

## Introduction

This paper is aimed at highlighting issues in the recent amending Acts in Code of Civil Procedure, 1908 with special focus on the Khyber Pakhtunkhwa Civil Procedure (Amendment) Act, 2020 (Act No XLIX Of 2020) (hereinafter referred to as the Act) which appears to be full of inconsistencies, anomalies and poses problem of interpretation for courts.

### Issue # 1:

#### Section 6 of the Act: --

*“6. Pecuniary jurisdiction. ---Save in so far as is otherwise expressly provided, all civil suits shall be filed in the following manner, namely:*

*(a) where the amount or value of the subject matter of the suit is below rupees*

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*fifty million, the suit shall be filed in the Court of Civil Judge, as may be prescribed by the High Court; and*

*(b) where the amount or value of the subject matter of the suit is rupees fifty million or above, the suit shall be filed in the Court of District Judge, as may be prescribed by the High Court.”*

1. Section 6 deals with filing of civil suits on the basis of pecuniary jurisdiction as follows;

(i) Below 50 million in the court of Civil Judge.

(ii) 50 million or above in the court of District Judge. But the opening sentence “Save in so far as is otherwise expressly provided, all civil suits shall be filed in the following manner, namely: “has subordinated this section to any other provision contained elsewhere (not confined to the Code of Civil Procedure). In such situation Section 9 of the West Pakistan Civil Courts Ordinance, 1962 (as applicable in the Khyber Pakhtunkhwa) (hereinafter referred to as the Ordinance) provides otherwise and shall prevail as this section has not been made subject to any other provision or law. Section 9 of the Ordinance is reproduced as under: -

*“Section 9. Pecuniary limits of Jurisdiction of Civil Judges. The jurisdiction to be exercised in original civil suits as regards the value by any person appointed to be a Civil Judge shall be determined by the High Court either by including him in a class or otherwise as it thinks fit.”*

2. Peshawar High Court (like all other High Courts of the Country) has determined unlimited pecuniary jurisdiction of Civil Judge First class right from day one (latest notification is 5th June 2002)

3. The next question for determination is if it is presumed that the opening sentence of section 6 above was not there then whether section 6 as amended, or section 9 was to be followed. The rule of interpretation is that in case of any conflict between special law and general law the former shall prevail regardless of general law being subsequent in time. The Ordinance is special law dealing with constitution of civil courts, their grades, pecuniary limits, subordination and superintendent & control. The Civil Procedure Code (hereinafter referred to as the Code) has never assimilated this special subject in the history of sub-continent. The Code only mentions of Civil Courts but no detail about the hierarchy of civil courts is the subject of the Code, and this fact has been affirmed by Section 3 of the Act under discussion which is reproduced below;

*“3. Hierarchy of courts. ---For the purpose of this Code, the hierarchy of Civil Courts shall be the same as provided in the West Pakistan Civil Courts Ordinance, 1962 (W.P. Ordinance No. II of 1962).”*

The predecessor laws dealing with this special subject of hierarchy of courts in this Province after Law and Justice Regulation of 1901 were the North-West

Frontier Province Courts Regulation, 1930/1931, the North-West Frontier Province Courts Act 1952 (enacted but not promulgated) and then present Civil Court Ordinance, 1962. Prior to 1901 when this province was part of Punjab the laws establishing courts hierarchy were Punjab Courts Act 1865, Punjab Chief Courts Act 1866 and 1877 and Punjab Courts Act 1884. After separation from Punjab this kind of laws in Punjab were Punjab Courts Act 1914 and 1918. The Civil Procedure Codes in vogue during this period in joint Punjab and then separate Punjab and this province were the Code of Civil Procedure (Act VIII of 1859) amended three times in 1860, 1861 and 1874. The second Code was enacted in 1877 (Act X of 1877, as amended in 1878 and 1879). The third Code was enacted in 1882 (Act XIV of 1882) as amended in 1882, 1888, 1892, 1894 and 1895. Then the present Code was enacted in 1908 at the time the province of present Khyber Pakhtunkhwa had already been established. The second kind of laws i.e., providing for procedure of civil courts never made hierarchy of civil courts as their subject.

4. However, the scheme of Code of Criminal Procedure is quite different. The Code of Criminal procedure right from day one provided for procedure as well as hierarchy of criminal courts. There is and has never been any separate law for establishing criminal courts. Different Codes of Criminal Procedure are Code of Criminal Procedure 1861 as amended in 1869. Another Code was enacted in 1872 and then 1882 and finally the present Code of 1898.
5. Now if we presume that in the absence/presence of opening sentence of section 6 of the Code there is conflict between section 6 of the Code and section 9 of the Civil Court Ordinance, 1962 then though special law is to prevail over general law but rule of interpretation is that efforts should be made to make both the laws meaningful and redundancy of any of the laws should be avoided by searching all possible avenues of interpretation. The following possible effort is made to see if both the laws can exist side by side and both operative and meaningful. The word used in Section 6 of the Code is “filed” and not “instituted” “trial” “taking jurisdiction” and the like as used in the Code or Ordinance for court having jurisdiction in the suit. What does word “filed” mean? Would it mean conferring jurisdiction on court in which suit is filed or after filing it is to be sent to concerned court having jurisdiction under the special law mentioned above. If we go through the whole of the Code, the words used are that every suit is instituted and not filed so much so in the Act under consideration section 26 says that every suit shall be instituted. The word “file” in the Code is used for written statement, different applications etc. In the Ordinance, the word “file” is used for suit but what does it mean? Section 21 of the Ordinance is reproduced below which will clarify the whole position.

“Section 21. Temporary vacancy of office of District Judge

In the event of the death of a District Judge or of his being prevented from performing his duties by illness or other cause, the Additional District Judge, if any, or in the absence of the Additional District Judge from the district, the senior most of the Civil Judges at the headquarters, shall assume charge of the district without interruption of his ordinary jurisdiction, and while so in charge shall perform the duties of the District Judge with respect to the filing of suits and appeals, receiving pleadings, execution of processes and the like, and shall be designated Additional District Judge or Civil Judge, as the case may be, in charge of the district and shall continue in such charge until the office of the District Judge has been resumed or assumed by an officer duly appointed thereto.”

It clearly shows that a suit or even appeal can be filed before civil judge having no jurisdiction but the same shall be referred to court having jurisdiction. In normal situation such suits and appeals can be filed before a civil judge having no jurisdiction and then referred to the concerned court. Section 16 of the Ordinance deals with the matter which is reproduced below;

**Section 16. Delegation of Powers by District Judges**

*“16. Delegation of Powers by District Judges --A District Judge may with the previous sanction of the High Court, delegate, in respect of any specified portion of the district, to any Civil Judge in the district, his powers under sections 14 and 15 of this Ordinance and the powers of the District Court under section 24 of the Code of Civil Procedure, 1908, and such powers may be exercised by such Civil Judge subject to the general control of the District Judge.”*

This section allows any civil judge of any class that a suit/appeal be filed before him for distribution to concerned court having jurisdiction. But the next challenge is that if filing is allowed under section 6 of the Act, then it would militate against section 15 &16 of the Ordinance according to which every suit can be filed before any civil judge whom the power is delegated by District Judge or before District Judge himself who distributes it further to concerned court. This effort fails and to me there is no other possible avenue of reconciling both these laws. Hence redundancy shall be attributed to section 6 of the Act.

**Issue # 2**

**Section 96 of the Act:**

“96. Appeal from final judgment or decree.---Save where otherwise expressly provided in the body of this Code and notwithstanding anything contained in any other law for the time being in force, an appeal shall lie to the District Court from the final judgment and decree passed by the Civil Court, while an appeal shall lie to the High Court from the final judgment and decree of the District Court while exercising original jurisdiction on any question of law or fact erroneously

determined by the original court and the Appellate Court shall decide the appeal within six months, after completion of service of summons.”.

VI. The forum of appeal has always been the subject of the Ordinance and predecessor laws as mentioned in paragraph 6 above, The Code never assimilated it. But section 96 has been given overriding effect over all other laws and subordinate status to any provision if otherwise provided in the Code itself. The Code does not provide otherwise as this has never remained the subject of the Code. The Code only provides for the procedure of appeal. The repealed section 96 (1) was as under;

*“96. —Appeals from Original Decrees (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.”*

The repealed section only spoke of appeal from original decree to Court authorized to hear appeals from the decision of such Court. The law providing for Court authorized to hear appeal were sections 17 & 18 of the Ordinance which are reproduced below;

“17. Appeal from District Judges or Additional District Judges—

- (1) Save as otherwise provided by any enactment for the time being in force, an appeal from a decree or order of a District Judge or Additional District Judge exercising original jurisdiction shall lie to the High Court.
- (2) An appeal shall not lie to the High Court from a decree or order of an Additional District Judge in any case in which, if the decree or order had been made by the District Judge, an appeal Would not lie to that Court.”

“18. Appeals from Civil Judges. —

- (1) Save as aforesaid, an appeal from a decree or order of a Civil Judge shall lie—
  - (a) to the High Court if the value of the original suit in which the decree or order was made exceeds 1[one million rupees]; and
  - (b) to the District Judge in any other case.
- (1A)-----”

VII. Here we are confronted with more alarming situation. The opening sentences of section 17 & 18 of the Ordinance have put themselves subordinate to any other enactment for the time being in force. This means that had new section 96 of the Act been not given overriding effect expressly even then section 96 had prevailed over sections 17 & 18 of the Ordinance. But the problem here is that the terms “Civil Court” and “District Court” have been used in new section 96 of the Act. In section 6 the terms “Civil Judge” and “District Judge” have been used. In section 17 and 18 of the Ordinance for the purpose of appeal the terms “District

Judge” “Additional District Judge” and “Civil Judge” have been used. Now we are to see why different terms have been used in the same Act in two different sections. When legislature uses different terms then intention of legislature is to be gathered from the meanings assigned to each term. Using different term by legislature has meanings. The term “Civil Court” has never been defined in the Code. Only “District Court” has been defined in the Code. The ‘Civil Court’ finds mention in the Ordinance and under section 3 of the Ordinance the detail of Civil Courts has been given. Section 3 is reproduced as under;

***3. Besides the Courts of Small Causes established under the Provincial Small Cause Courts Act, 1887, and the Courts established under any other enactment for the time being in force, there shall be the following classes of Civil Courts, namely: —***

- (a) the Court of the District Judge;
- (b) the Court of the Additional District Judge; and
- (c) the Court of the Civil Judge.

Now the result is that appeals from Civil Courts shall lie to the District Court. Civil Courts include Additional District Judge and District Judge. Now what is the definition of “District Court.” In the Code in section 2 (4) the term “District Court” finds mention. The same provision is reproduced below;’

*"2 (4) District" means the local limits of the jurisdiction of a principal civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court."*

Here term ‘District’ is defined with reference to local limits of the jurisdiction of principal civil court of original jurisdiction (called District Court). Here we should be clear that this District is not Civil District or Revenue District raised under Section 4 of the Ordinance or under sections 5 & 6 of West Pakistan Land Revenue Act, 1967, respectively. This District is a concept of local limits of jurisdiction of principal civil court of original jurisdiction. It is explained in section 2(4) above that ‘District’ here includes the local limits of ordinary civil jurisdiction of a High Court. Now the local limits of the original civil jurisdiction of a High Court extends throughout the province hence for the purpose of this sub section District means the whole Province. Not only this but this District can extend to more than one province. When Punjab had High Court of Judicature at Lahore in 1919 the jurisdiction of this High Court extended to Province of Punjab and Delhi. The whole of Punjab and Delhi Province were one District for the purpose of this sub section. In 1976 we had one High Court at Karachi both for province of Sindh & Baluchistan so the District for the purpose of this sub section consisted of two provinces. The Ordinance raises Court of District Judge and not District Court. Now we will see is court of District Judge principal civil court of original jurisdiction within the meanings of subsection 2(4) of the Code? It is section 7 of the Ordinance which is reproduced as under;

*“7. Original Jurisdiction of District Judges in Suits---Except as otherwise provided by any enactment for the time being in force, the Court of the District Judge shall have jurisdiction in original civil suits without limit as regards the value.”*

By virtue of this section District Judges have been given original civil jurisdiction without limit as regards the value hence it is principal civil court of original jurisdiction. Now the High Court has also conferred Civil Judge First class civil jurisdiction without limit as regards the value then can Civil Judge class I, is principal civil court of original jurisdiction? Similarly, Court of Additional District Judge is established under section 6 of the Ordinance. Section 6 is reproduced below;

*6. Additional District Judges--(1) Government may, in consultation with the High Court, appoint as many Additional District Judges as may be necessary.*

*(2) An Additional District Judge shall discharge such functions of a District as the District Judge may assign to him, and in the discharge of those functions he shall exercise the same powers as the District Judge.*

Though Court of Civil Judge class one and Additional District Judges have unlimited pecuniary jurisdiction, but they cannot be called District Court as these are not principal courts. Two conditions must be present for a court to be called District Court i.e., unlimited pecuniary jurisdiction and principal court. A court cannot be principal civil court of original jurisdiction (as these are the words used in section 2(4) of the Code) unless it has unlimited pecuniary jurisdiction. Principal Court in any jurisdiction can be only one. The only exception is that a High Court is also District Court as defined in subsection 2(4) of the Code. Other may be exercising powers of principal court but cannot be termed principal court. As a civil judge may be delegated powers of principal civil court or Additional District Judges exercising powers of principal court but cannot be called as Principal Civil Court of Original Jurisdiction and hence not District Court. This whole issue would be resolved if one can visualize a situation in which a District Judge would not be a District Court. This visualization is not hypothetical but actual. In Karachi, the District Judge is not District Court as he has no unlimited pecuniary jurisdiction in original suits<sup>2</sup>. Then how can an Additional District Judge or Civil Judge can be called principal civil court of original jurisdiction merely on being conferred unlimited pecuniary powers? The power of principal civil court cannot be shared. It is then clear that use of different terms of “District Court” and “District Judge” are not without significance. And if we bring Civil Judge First Class also in definition of principal civil court of original jurisdiction then he becomes ‘District Court’, and the result would be that all appeals from all courts in a civil District shall lie to High Court.

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<sup>2</sup> PLD 1981 K 210—PLD 1970 K 362

VIII. Now as per new section 96 of the Act the appeals from Civil Court shall lie to District Court which means Additional District Judge is also included in Civil Court and appeal against his order shall lie to District Court (which in case of whole province of KPK is District Judge). And appeals from District Court (District Judge) to High Court.

### **Issue # 3**

In Punjab Code of Civil Procedure (Punjab Amendment), Ordinance (VII of 2021) was promulgated having some provisions common to the KP CPC Amendment Act under consideration. The Lahore High Court declared the whole Ordinance ultra vires the Constitution mainly on the ground that under Article 202 of the Constitution it is the High Court to lay down practice and procedure for itself and court subordinate to it<sup>3</sup>. The judgment held that as many provisions of the Punjab Ordinance 2021 touch the procedural aspect of the courts which is the sole domain of High Court and Legislature cannot touch even the sections of CPC if it goes contrary to procedure laid down in the First Schedule which is the domain of High Court. The judgment reached the conclusion that as the Ordinance 2021 touches procedures against the laid down procedure of High Court and promulgated without consulting the High Court hence is ultra vires. Though the Khyber Pakhtunkhwa Civil Procedure (Amendment) Act, 2020 (Act No XLIX Of 2020) has not been held so. But it is also a matter of discussion that what would be the effect of this judgment on the Khyber Pakhtunkhwa Civil Procedure (Amendment) Act, 2020 (Act No XLIX Of 2020).

### **Conclusion**

The examination of the Khyber Pakhtunkhwa Civil Procedure (Amendment) Act, 2020 reveals significant issues, particularly in Section 6 and Section 96. Section 6 introduces pecuniary jurisdiction for filing civil suits, but conflicts arise when compared with Section 9 of the West Pakistan Civil Courts Ordinance, 1962. The paper suggests that Section 6 may lead to redundancy and recommends reconsideration or clarification. Section 96 alters the forum for appeals, impacting the jurisdiction of District Courts and High Courts. The paper raises concerns about the terms used in this section and their implications, suggesting potential conflicts with existing laws. In the light of whatever has been said, the Act may be withdrawn to remove the prevailing confusion in the legal fraternity, or some authoritative jurisprudence should be developed to clarify the inconsistencies and anomalies in the law. Considering these multifaceted issues, the paper concludes by advocating for a strategic course of action, either through the withdrawal of the Act to eliminate confusion or the development of authoritative jurisprudence to systematically address the identified legal complexities and enhance the overall coherence of the legal framework.

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<sup>3</sup> PLD 2021 L 544